Touro Law Review

Volume 7 | Number 2 Article 7

1991

The First Amendment

Burt Neuborne

THE FIRST AMENDMENT

Judge Leon Lazer:

Our next speaker is going to deal with the first amendment cases. He is one of the leading authorities in the country on the first amendment. Professor Burt Neuborne of New York University Law School was, for four years, the National Legal Director of the American Civil Liberties Union, and for two years before that he was the Assistant Legal Director. He was Staff Counsel for the New York Civil Liberties Union for five years. He graduated from Harvard Law School, and he has written books on political and civil rights,[1] and several law review articles.[2]

When a first amendment question arises, the media immediately seems to quote Professor Neuborne. I support their judgment. He is the leading authority in this area and I invite him to address you now.

Professor Burt Neuborne:

When I left the ACLU to come back to New York University, my staff gave me a lovely little present, the "Marshal Michel Ney Award." So I went to the library to see who Marshal Michel Ney was. I discovered that he was the general Napoleon left behind to cover the retreat from Moscow.

It is quite fashionable these days, especially with Justice Brennan's retirement,[3] to speculate about the disintegration of

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1. *See, e.g.*, B. NEUBORNE, FREE SPEECH, FREE MARKETS, FREE CHOICE (1987); B. NEUBORNE, N. DORSEN, P. BENDER, EMERSON, HABER, AND DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (4th ed. 1976); B. NEUBORNE & A. EISENBERG, THE RIGHTS OF CANDIDATES AND VOTERS (1976); B. NEUBORNE & L. FRIEDMAN, UNQUESTIONING OBEDIENCE TO THE PRESIDENT: THE ACLU CASE AGAINST THE LEGALITY OF THE WAR IN VIETNAM (1972).

2. *See, e.g.*, Neuborne, *Judicial Review and Fundamental Rights: A Response to Professor Lee*, 26 ARIZ. L. REV. 5 (1984); Neuborne, *Judicial Review of Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982).

3. Justice William J. Brennan retired from the Bench on July 20, 1990. *See* Toner, *Brennan, Key Liberal, Quits Supreme Court; Battle for Seat Likely*, N.Y. Times, July 21, 1990, at 1, col. 4.

the Supreme Court's protection of constitutional rights. I would like to take a couple of seconds to do some speculation of my own, and then talk to you about the first amendment cases that were on the Court's docket last Term.

Of all the constitutional doctrines that have evolved during the Warren years,[4] of all the enhanced protection for individual liberties that the Supreme Court has provided, the one that is in the least danger of being rolled back is the first amendment.[5] The political spectrum in the free speech area is much more accurately described as a circle than a line, because the truth is that the libertarian left and the libertarian right are much closer to each other on the issue of free speech than either one of them is to the statist middle.

In terms of the current Supreme Court, Scalia on the right, and Brennan, when he was on the Court, on the left, were closer to each other on core free speech issues than either one of them was to Rehnquist or White in the center.[6] The cleavage on the Court in free speech cases is not on the traditional left/right spectrum but it is in the libertarian/statist cleavage which I think in the years to come is going to become increasingly important. I think we are going to see a reorganization of judicial thinking away from the traditional liberal/conservative perspective and much more toward a perspective of judicially enforced libertarianism, on one hand, versus a kind of deference to the majoritarian processes in the form of an increased deference to state determinations, on the other. *Cruzan*[7] is an interesting first shot in that war. The first amendment is the place in which the right and left libertarians cohabit most eas-

4. Chief Justice Earl Warren served on the United States Supreme Court from 1953 to 1969. CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 869 (2d ed. 1990).

5. The first amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

6. *See, e.g.*, United States v. Eichman, 110 S. Ct. 2404 (1990). In *Eichman*, Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy joined in the majority, while Justices Stevens, Rehnquist, White, and O'Connor joined in the dissent.

7. Cruzan v. Director, Missouri Dep't of Health, 110 S. Ct. 2841 (1990).

ily because their world views both depend on a very powerful first amendment.

First amendment protection is probably stronger now than it has been in years. There will be fights at the margins and lawyers will tell you that the world is coming to an end because they have not won a particular case, but I think the doctrine is in terrifically strong shape, and that free speech theory in the United States, on both the left and right, is in better shape than it has been in years.

Let us talk a little bit about the cases last Term. There were thirteen first amendment cases last Term; ten free speech cases,[8] and three religion clause cases.[9] I will deal with the religion clause cases last because I think it is there that some really serious cause for alarm about erosion of doctrine exists.

The first case that we ought to mention, not that it plowed new ground, but it held old ground, is the second flag desecration case, *United States v. Eichman*.[10] You recall that part of the Democrats' strategy—and it was an interesting strategy—in responding to *Texas v. Johnson*,[11] the first flag desecration opinion, was to try to delay a vote in Congress on a constitutional amendment altering the first amendment by holding out the hope that Congress could pass a statute that would be consistent with this decision, which would be valid, which would be upheld, and which would obviate the necessity for a constitutional amendment.[12] It was a politically attractive

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8. United States v. Kokinda, 110 S. Ct. 3115 (1990); Rutan v. Republican Party, 110 S. Ct. 2724 (1990); Milkovich v. Lorain Journal Co., 110 S. Ct. 2695 (1990); United States v. Eichman, 110 S. Ct. 2404 (1990); Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281 (1990); Keller v. State Bar, 110 S. Ct. 2228 (1990); Osborne v. Ohio, 110 S. Ct. 1691 (1990); Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990); Butterworth v. Smith, 110 S. Ct. 1376 (1990); FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990).

9. Board of Educ. v. Mergens, 110 S. Ct. 2356 (1990); Employment Div. v. Smith, 110 S. Ct. 1595 (1990); Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990).

10. 110 S. Ct. 2404 (1990).

11. 110 S. Ct. 2533 (1989).

12. Senator Sam Nunn, D-Georgia, when debating on passage of the Flag Protection Act of 1989, H.R. 2978, 101st Cong., 1st Sess., 135 CONG. REC. H5500 (daily ed. Sept. 12, 1989), stated, "While I will consider seriously a constitutional amendment if it becomes necessary, I believe that we should first attempt to rectify

deal to members of Congress and they took it. They enacted the second flag desecration statute.[13] It seemed to me from the beginning that it was a very cynical and unprincipled position because one could predict with a relatively strong degree of certainty that the statute would not be upheld by the Supreme Court. The lawyers who were given the responsibility of arguing it from the Solicitor General's office had no real hope that they were going to win, although they did a wonderful job of putting up a plausible set of arguments.[14]

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this situation by a statutory remedy with an accelerated appeals process." 135 CONG. REC.. S12,654 (daily ed. Oct. 5, 1989) (statement of Sen. Nunn); *but see id.* at S12,652 (daily ed. Oct. 5, 1989) (statement of Sen. Hatch) ("Despite the many assertions that [the Flag Protection Act] is not an effort, in effect, to amend the Constitution, it was clear from the substance and tone of these debates that that is precisely what is being attempted here.").

13. *See* Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (amending 18 U.S.C. § 700 (1988)). The act provides in pertinent part:

> SEC. 2. CRIMINAL PENALTIES WITH RESPECT TO THE PHYSICAL INTEGRITY OF THE UNITED STATES FLAG.
>
> (a) IN GENERAL. — Subsection (a) of section 700 of title 18, United States Code, is amended to read as follows:
>
> "(a)(1) Whoever knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon any flag of the United States shall be fined under this title or imprisoned for not more than one year, or both.
>
> "(2) This subsection does not prohibit any conduct consisting of the disposal of a flag when it has become worn or soiled.".
>
> (b) DEFINITION.—Section 700(b) of title 18, United States Code, is amended to read as follows:
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> "(b) As used in this section, the term 'flag of the United States' means any flag of the United States, or any part thereof, made of any substance, of any size, in a form that is commonly displayed.".

14. First, the government distinguished the factual background in *Eichman* from that in *Johnson.* It stated that this case involved:

> [T]he Flag Protection Act of 1989, a federal statute enacted in response to *Texas v. Johnson*, under circumstances in which Congress was mindful of the First Amendment's stricture that "Congress shall make no law . . . abridging the freedom of speech . . . ." U.S. Const. Amend. I. Congress drafted the statute within this constitutional framework, making a considered legislative determination that the American flag is a unique national symbol deserving special protection consistent with applicable First Amendment limitations. . . . [Therefore,] the pertinent constitutional analysis should focus on the sort of expressive conduct at issue here—flag burning—and then take into account the national consensus underlying the Flag Protection Act—that physical destruction of the American flag, the unique symbol of the Nation, constitutes a violent assault on the shared values that bind our national community.

In *Eichman*, as I think one could have predicted, the Supreme Court struck down the second flag desecration statute.[15] They lined up the same way as in *Johnson* and struck the statute down.[16] The distinction that they rejected is a distinction that you may find interesting at the local level. The first statute was drafted in terms of behavior which cast the flag in a negative light, and which was intended to express some sort of negative sense about the flag.[17] The Supreme Court said that this

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Brief for the United States at 26-27, United States v. Eichman, 110 S. Ct. 2404 (1990) (No. 89-1433).

Next, the government argued that:

> The First Amendment . . . is not value free. To the contrary, the libertarian model of First Amendment analysis, although demonstrably the prevalent theme in the Court's modern jurisprudence, has not swept all competing themes off the constitutional board. The marketplace of ideas, like other markets, has limits. . . .

Id. at 31.

> [T]he Court should treat the conduct at issue—physical destruction of a flag of the United States—as it has such other narrowly defined categories of expressive conduct that have not merited full protection under the First Amendment. Flag burning, like obscene materials, speech proposing an illegal activity, perjury, and defamatory statements, presents substantial "evils" incompatible with "the very purpose for which organized governments are instituted." . . . And, such conduct (at most) involves "expressive interests" which, given the availability of other means of expression, are "overwhelmingly outweigh[ed]" by the identified harm.

Id. at 38 (footnotes and citations omitted).

Lastly, the government argued that "to the extent that the Court in *Johnson* accorded flag burning, as expressive conduct, full First Amendment protection—as the courts below construed that decision, . . . *Texas v. Johnson* should be reconsidered and, upon reconsideration, appropriately limited." *Id.* at 42 (citations omitted). *See also* Arguments Before the Court, 58 U.S.L.W. 3733 (May 22, 1990).

15. *Eichman*, 110 S. Ct. at 2410.

16. In *Eichman* and *Johnson*, the majority was comprised of Justices Brennan, Marshall, Blackmun, Scalia, and Kennedy, while the dissent was comprised of Chief Justice Rehnquist, and Justices White and O'Connor.

17. *Eichman*, 110 S. Ct. at 2408. The first statute, TEX. PENAL CODE ANN. § 42.09 (Vernon 1989), provided: "A person commits an offense if he intentionally or knowingly desecrates . . . a state or national flag." It continued: "For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action." *Id.* § 42.09(a), (b).

is a content related standard.[18] You cannot regulate political speech by reference to its content.[19]

The second statute came back and said, okay, what we will do is take out of the statute any hint that what we are aiming at are negative expressions about the flag. We will simply forbid burning of the flag, regardless of what the intent is.[20] Of course they had an exemption for burning old flags, and for getting rid of flags that had been worn out.[21] The attempt was to impose a neutral restriction on the treatment of the flag that forbade all mutilations of the flag regardless of whether it was cast in a bad light, or was obviously intended to express some negative political comment.[22]

The Supreme Court said, "look, anybody prosecuted under this statute for doing something to the flag is attempting to express a political idea."[23] Simply trying for a smoke screen of neutrality that would appear to say that all people who mutilate the flag will violate the statute really blinks at reality.[24] The reality is that the only people who are going to try to use this vehicle for protest are saying something dramatic about the society. They are expressing an idea and, therefore, they are protected by the first amendment no matter what the allegedly facially neutral criteria that exists in the statute. The Court struck the Act down by the same five to four vote.[25]

The strategy turned out to be absolutely brilliant. It was a cynical strategy, but it was a brilliant strategy. The theory behind the second statute was not to have it upheld, but to buy a year's time to get people accustomed to the idea that a flag could be burned. Remember the two different sets of reactions to the two different decisions. The reaction to the first flag de-

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18. *Eichman*, 110 S. Ct. at 2408-09.

19. *Id.*

20. *See* Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777; *supra* note 13.

21. *See supra* note 20.

22. *See* S. Rep. No. 152, 101st Cong., 1st Sess. 1, 9-12, *reprinted in* 1989 U.S. CODE CONG. & ADMIN. NEWS 610, 618-21.

23. *See* United States v. Eichman, 110 S. Ct. 2404, 2408-09 (1990).

24. *See id.*

25. *See supra* note 16.

cision, a year ago June,[26] was extraordinarily emotional.[27] If a vote could have been forced on the constitutional amendment in the short period of time after the first decision, I have no doubt that Congress would have been stampeded into passing it. It would have been the first time that we ever attempted to amend the first amendment. Once you start tugging on that little piece of string, who knows where the unraveling of the fabric finally stops. It was a very dangerous road to go down.

This tactic bought a year. When the second flag desecration statute was struck down,[28] people were used to it, politicians were used to it; they were able to gauge whether there was any danger of being defeated as a result of this particular issue, and the temperature in Washington cooled down enormously.[29] You recall that when the constitutional amendment went to a vote in the House of Representatives, it was defeated and never had to go to the Senate.[30] So the passage of a year was an extraordinarily important political event, although I still believe that it was rather cynical and dishonest, because it was a foregone conclusion what the Supreme Court would do.

The majority, by the way, and this underscores my opening remarks, in both flag desecration cases contained both Brennan

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26. Texas v. Johnson, 110 S. Ct. 2533 (1989), was decided on June 21, 1989.

27. *See, e.g.*, Note, *The Protection of Flag Burning as Symbolic Speech and the Congressional Attempt to Overturn the Decision:* Texas v. Johnson, 58 U. CIN. L. REV. 1477 (1990); *Up and Down the Capitol Flagpole*, Wash. Post, July 4, 1989, at D3; *Fourth of July Oration*, N.Y. Times, July 3, 1989, § 1, at 19, col. 6; *Burning the Guarantor of Liberty*, Boston Globe, June 28, 1989, at 19.

28. *Eichman* was decided on June 11, 1990.

29. *Accord Defending the Flag Against Desecration*, N.Y.L.J., July 12, 1990, at 2, col. 6; *Flag Burning Issue: A Sensible Defeat*, N.Y.L.J., July 5, 1990, at 2, col. 6; *Flag Burning Amendment Tears Up Tarmac*, Nat'l L.J., June 25, 1990, at 5, col. 1; *Supreme Court Voids Flag Law; Stage Set for Amendment Battle*, N.Y. Times, June 12, 1990, at A1, col. 1; *Flag Burning Law Held Unconstitutional*, N.Y.L.J., June 12, 1990, at 1, col. 5; *Rally 'Round the Flag?*, Nat'l L.J., May 14, 1990, at 1, col. 3.

30. *See* 136 CONG. REC. H4006-29 (daily ed. June 21, 1990); 136 CONG. REC. H4087-88 (daily ed. June 22, 1990) (the proposed amendment to the U.S. Constitution, H.R.J. Res. 350, 101st Cong., 2d Sess., 136 CONG. REC. H4006 (daily ed. June 21, 1990), was defeated in the House by a vote of 254 yeas to 177 nays, missing the two-thirds required for passage); *see also* Holmes, *Amendment to Bar Flag Desecration Fails in the House* N.Y. Times, June, 22, 1990, at 1, col. 3.

on the left, and Scalia on the right,[31] one of those rare cases where they voted together. The votes that put the issue over the top were votes by Kennedy and Scalia,[32] Reagan's two appointees to the Court.[33] That is a perfect example of the coalescence of a libertarian left and a libertarian right on an issue of first amendment theory where there is a very strong understanding between the two branches;[34] it was White and Rehnquist in the middle who were complaining, not either ideological wing of the Court.[35]

The Court's other first amendment cases this Term are interesting and of some practical significance to lawyers working in local government. I believe someone spoke to you this morning about *Rutan*,[36] because *Rutan* has significance in many different areas but let me reinforce the issues, since this case is very dear to my heart. *Rutan v. Republican Party* was the case that reinforced the notion that you simply cannot, as a matter of first amendment law, discriminate against public employees because they do not belong to the political party in power:[37] Public employees cannot be denied hiring or rehiring after layoff because they do not belong to the party in power, and they cannot be treated differently in terms of wages, raises, and job assignments because they do not belong to the party in power.[38]

Rutan is a serious blow to the traditional patronage system because it states that if you attempt to carry out a traditional patronage system, you are running a very, very serious risk of

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31. *See supra* note 6 and accompanying text.

32. *Id.*

33. Justice Scalia was nominated by President Reagan on June 24, 1986 and confirmed by the Senate by a 98-0 vote on September 17, 1986. CONGRESSIONAL QUARTERLY'S GUIDE TO THE U.S. SUPREME COURT 880 (2d ed. 1990). Justice Kennedy was nominated by President Reagan on November 30, 1987 and confirmed by the Senate by a 97-0 vote on February 3, 1988. *Id.*

34. *See supra* text accompanying notes 6-7.

35. *See* United States v. Eichman, 110 S. Ct. 2404, 2410 (1990) (Rehnquist, C.J., and White, J., joined Justice Stevens' dissent); Texas v. Johnson, 110 S. Ct. 2533, 2548 (1989) (Rehnquist, C.J., authored the dissent joined by White and O'Connor, JJ.,).

36. Rutan v. Republican Party, 110 S. Ct. 2729 (1990).

37. *Id.* at 2732, 2736-39.

38. *Id.* at 2736-39.

first amendment litigation, a very serious risk that the people who are injured by the application of the patronage system will be able to sue for damages under section 1983[39] and win very significant recoveries for lost wages and other forms of damages in that situation.

Remember, of course, there is an important exception to the *Rutan* line of cases, and that is policy-making employees.[40] The democratic process requires that when one party wins and another party loses, that at the policy-making level, people consistent with the new party be brought in to run the government.

In *Rutan*, we are talking about the ministerial level. We are talking about the janitors, the people who work in the parks, and the people who pick up trash, for whom politics is irrelevant in terms of how well they are going to do their job. What *Rutan* reinforces is that the Court is committed to the process of dismantling the notion that there can be a spoils system that operates in the area of local government.[41] The spoils system that continues to operate in large areas of the United States[42] is now extremely vulnerable to attack under *Rutan*. Those of you who have responsibilities for local government, it seems to me, must give some very careful advice as to whether they can continue to operate traditional spoils patronage systems without exposing both the municipality and the individuals to very, very significant potential liability.

The other important associational rights case that was decided—and *Rutan* is an associational rights case because it penalizes association with the party that lost by losing job opportunities—was *Keller v. State Bar*,[43] which again is interesting because it has implications for many things in New York. Cali-

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39. 42 U.S.C. § 1983 (1988).

40. *See Rutan*, 110 S. Ct. at 2737; *see also* Elrod v. Burns, 427 U.S. 347, 367 (1976).

41. *Rutan*, 110 S. Ct. at 2736, 2738-39.

42. *See Note, Political Patronage in Promotion, Hiring, Transfer, and Recall Decision*, 104 HARV. L. REV., 227, 227-28 (1990); *Justices Bar Most Political Patronage*, L.A. Times, June 22, 1990, Pt. A, at 1, col. 4; *Patronage Jobs Illegal: Political Spoils System Declared Unconstitutional*, Newsday, June 22, 1990, at 3; *Party Work Puts Llers on the Public Payroll*, Newsday, June 22, 1990, at 3.

43. 110 S. Ct. 2228 (1990).

fornia, as you may know, has what is known as an integrated bar. You cannot practice law in California unless you belong to the California State Bar Association.[44] You may be admitted to practice by the state supreme court, but you are prohibited from actually practicing law in California unless you join the state bar.[45] We do not have those rules here in New York. You do not have to join the bar association to practice, but in many states in the United States, you must be a member of the bar to practice in that state.[46] The California Bar Association charged substantial dues, a couple of hundred dollars a year, and used those dues for a wide variety of purposes, including lobbying, and taking positions on political candidates, taking positions on public issues.[47] The question then arose, can an individual lawyer who is forced, in order to practice law in the state, to join the organization and pay dues, object when that organization uses her money to advance ends that the lawyer disagrees with?[48] Isn't this a type of involuntary taxation by an entity using the money to advance political views that the individual does not necessarily agree with? There is a long line of cases on this topic concerning labor unions involving mostly union shop cases.[49] Under those circumstances, a union cannot

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44. *See* CAL. BUS. & PROF. CODE § 6125 (West Supp. 1991) ("No person shall practice law in California unless the person is an active member of the State Bar.").

45. *See Keller*, 110 S. Ct. at 2235; CAL. BUS. & PROF. CODE § 6064 (West 1990).

46. *See* Rector, *Compelled Financial Support of a Bar Association and the Attorney's First Amendment Rights: A Theoretical Analysis*, 66 NEB. L. REV. 762, 763 & nn.5-7 (1987); Parness, *Citations and Bibliography on the Unified Bar in the United States*, AMERICAN JUDICATURE SOCIETY INFORMATION REPORT (1973); AMERICAN JUDICATURE SOCIETY, CITATIONS AND BIBLIOGRAPHY ON THE INTEGRATED BAR IN THE UNITED STATES (1961).

47. *Keller*, 110 S. Ct. at 2231 & n.2.

48. *Id.* at 2231-32.

49. *See, e.g.*, International Ass'n of Machinists v. Street, 367 U.S. 740, 768-69 (1961) (Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 (1988), "is to be construed to deny the unions, over an employee's objection, the power to use his exacted funds to support political causes which he opposes."); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977); Brotherhood of Ry. & S.S Clerks v. Allen, 373 U.S. 113 (1963); *see generally* Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court's Opinion in* Beck, 27 HARV. J. ON LEGIS. 51 (1990); Malin, *The Legal Status of Union Security Fee Arbitration After* Chicago Teachers Union v. Hudson,

use its dues to advance political ideas that individual members of the union disagree with, without providing some form of refund mechanism.[50] In other words, they must refund a pro rata share of the dues to the dissenting members.

What the Supreme Court did in *Keller*, unanimously, was to apply that reasoning to the California Bar Association as well. It said that the California Bar Association could use the dues for all purposes, and this is a code word, that were "germane" to the carrying out of the purposes of the California Bar Association,[51] but the moment it started using the dues for additional material, then it had to provide for some form of pro rata refund in connection with the material.[52] Those of you who represent municipalities with union or agency shop agreements, this is directly relevant to the permissible uses of local union dues. Indeed, any coercive institution in which individuals must become members, either because the government requires them to, to carry out their profession, or because practical situations do not give them any choice, seem to me to fall under the principles announced in *Keller*.

The case that originally announced this policy is a labor case decided some years ago, *Abood v. Detroit Board of Education*[53] The *Abood* principle comes full circle in *Keller* and says that coercive institutions that force people to join, and then take their money and use it to support causes that these indi-

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29 B.C. L. REV. 857 (1988); Comment, *Constitutional Consideration Affecting the Methods of Exacting Union "Fair-Share" Collective Bargaining Fees From Non-Member Public Employees*, DET. C. L. REV. 767 (1985); Comment, *Collective Bargaining vs. the First Amendment: Court Ordered Remedies for the Political Use of Mandatory Union Fees*, 18 U.C. DAVIS L. REV. 555 (1985); Note, *Agency Shops and the First Amendment: A Balancing Test in Need of Unweighted Scales*, 18 RUTGERS L.J. 833 (1987).

50. *See* Ellis v. Brotherhood of Ry., Airline & S.S. Clerks, 466 U.S. 435 (1984) (union's rebate scheme inadequate to protect objecting employees from "misuse" of their union contributions); *Allen*, 373 U.S. at 122 (providing instructions to unions to institute pro rata refund to employees for portion of union dues spent on objectionable causes); *Street*, 367 U.S. at 775 (first advancing the idea of pro rata refund to employees in these situations).

51. Of course, what is "germane" and what is not "germane" to the operation of the organization is a distinction which will be disputed for a long time.

52. Keller v. State Bar, 110 S. Ct. 2228, 2236-38 (1990).

53. 431 U.S. 209 (1977).

viduals disagree with, are going to be treated just like the labor unions.[54] The state bar was actually taking its members' money and "forcing" these members to support positions that they politically disagreed with.

Keller protects a very important area for carving out some freedom for individuals who are forced to become members of organizations, and then have the organizations take organizational positions that the individuals disagree with. I hasten to add that it does not mean that the individual can become a free rider. The individual has to pay a fair share of the organization's costs in providing a service, like a labor union.[55] If you do not pay dues, then you might have to pay some service fee. Since you benefit from the bargaining that the union provides, you have to pay to help support that bargaining. But the moment the organization goes beyond that and starts doing things that are not germane to its principal purpose, then there is a potential first amendment problem under the Court's decision in *Keller*.

The issue that is analogous in New York is the question of whether public utilities—you do not have a choice, you want electricity, you pay your money to a public utility—can take money from ratepayers and use that money to advance social causes that the ratepayers disagree with, or whether those payments by the public utility must be charged to the shareholders and not to the ratepayers in connection with the rate base.[56] For example, if Consolidated Edison in New York City gives money to a series of controversial organizations, can ratepayers demand a pro rata refund of that amount so that the full cost of that contribution is not borne by the ratepayers who have no choice but to support the institution, but by the shareholders of the company?

The New York State Court of Appeals ruled a year ago in the *New York Telephone* case[57] that the first amendment applied in that situation and that ratepayers could not be forced

54. *See Keller*, 110 S. Ct. at 2235.

55. *Id.*

56. *See* Cahill v. Public Serv. Comm'n, 76 N.Y.2d 102, 556 N.E.2d 133, 556 N.Y.S.2d 840, *cert. denied*, 111 S. Ct. 344 (1990).

57. *Id.*

to make involuntary contributions to charities or to political institutions through the vehicle of the public utility.[58] At that point the public service commission altered its rules and now forbids utilities from allowing charitable payments to be used as part of the rate base. The charitable payments must now be borne by the shareholders, not by the ratepayers. The case has been appealed to the Supreme Court.[59]

This Term's case involving that issue is a teacher's union out of Michigan.[60] The Court has identified seven different functions that the union performs; it will then decide whether each function is "germane" to the purposes of the union, and therefore, may be supported by the general dues.[61] Such a conclusion will mean that in every union or agency shop labor union, the first person they hire is a lawyer, and the second person they hire is a cost accountant because they have to allocate out all of their functions, between functions of germaneness and functions of non-germaneness.

The question that is up in the air is what kind of mechanism for refund will be required. It is sort of mad in a way. It is theoretically driven, I think, by a correct vision of the first

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58. *Id.* at 114, 556 N.E.2d at 137-38, 556 N.Y.S.2d at 845.

59. Certiorari was denied on October 29, 1990. New York Tel. Co. v. Cahill, 111 S. Ct. 344 (1990).

60. *See* Lehnert v. Ferris Faculty Ass'n, 881 F.2d 1388 (6th Cir. 1989), *cert. granted*, 110 S. Ct. 2616 (1990).

61. *See* 59 U.S.L.W. 3023 (July 17, 1990). The question presented to the Court is whether the:

> First and Fourteenth Amendments permit [a] public employer to compel objecting non-union public employees to contribute, as a condition of their employment, to costs of following activities engaged in by their exclusive bargaining representative and its state and national affiliates: (a) activities on behalf of persons not in employees' bargaining unit, including employees in other states and different professions, and retirees; (b) lobbying at state and federal levels on measures not for ratification of, or authorization or appropriation of funds, for, bargaining agreement covering employees' bargaining unit; (c) electoral politics, including campaigns concerning ballot issues; (d) public relations activities; (e) non-bargaining activities related only generally to employees' profession; (f) meetings of affiliates that primarily serve political and ideological purposes; and (g) threatening and preparing for illegal strikes?

Id. See also Lehnert v. Ferris Faculty Ass'n, 881 F.2d 1388 (6th Cir. 1989) (court found activities "sufficiently related" to union's duty as exclusive bargaining representative so that non-member dues paying individuals were rightfully charged).

amendment; but if you apply it, for example, to the public utilities situation where the difference in the bill to the rate payer is going to be minuscule, you are talking about theoretical amounts of a penny or so, or possibly even less. Therefore, the cost of running a system to refund the money is going to be much greater than the money. Only lawyers could invent something like that, by the way. But the transaction costs of administrating the refund mechanism may well be so expensive that it might dry up the original payments in the first place. In other words, what we may be entering into here is an era where, although we have not meant to do this, the administration of these situations will be so expensive that the entity will stop giving donations; the public utilities will simply no longer contribute to charity because the moment they start contributing, the first amendment will require them to have a refund mechanism. This type of refund mechanism will cost a bloody fortune. The whole program will become so expensive that it will just not be worth doing anymore.

That is the potential for unintended adverse social impact of these programs and yet first amendment theory seems to drive them directly towards that result.

There was one extremely easy case which those of you involved in law enforcement should take note of and that is *Butterworth v. Smith.*[62] In this case, the Court dealt with a Florida statute that forbade witnesses before a grand jury to ever reveal their testimony, ever, ever, ever, and I mean ever.[63] I mean it was a permanent ban on a witness ever revealing testimony, even after the grand jury investigation was over, even after there was no longer any need for secrecy.[64]

Florida argued that they needed that kind of guarantee to be able to assure grand jury secrecy;[65] that an absolute prohibition on a witness revealing testimony before a grand jury was necessary for the integrity of the grand jury process.[66] The Supreme Court rejected that argument nine to zero, saying that

62. 110 S. Ct. 1376 (1990).
63. *See* FLA. STAT. ANN. § 905.27 (West 1985).
64. *Butterworth*, 110 S. Ct. at 1378.
65. *Id.* at 1381.
66. *Id.*

there is simply no reason to have so draconian a ban.[67] It seemed to me in reading the opinion that the Court would undoubtedly uphold narrower bans. In other words, they would say that during the pendency of the grand jury proceeding or during the investigatory period, even after the grand jury goes out of existence, if there is still an ongoing investigation, if there are still ongoing live criminal investigation issues, they would uphold bans on witnesses revealing the content of their testimony.

What made the Florida case so easy was that it was so unnecessarily overbroad. It was such a rigid and unbending prohibition that it allowed all nine members of the Court to say, look, if you are going to say, never, never, never, we are going to say that is just ridiculous. There is no reason to have such a draconian statute, therefore it was struck down.

The Court noted that the Florida rule went far beyond the existing federal standard.[68] I suspect that what they were doing was telegraphing to everybody that—they did not say the federal standard was constitutional—but, it is the federal standard that they ought to be looking to. And the federal standard is keyed to the existence of an ongoing criminal investigation.[69] It is during the life of the investigation that serious restrictions can be placed on what people can say about what is going on inside a grand jury.[70]

From a local regulation standpoint, probably the most important case of the Term is also the most confused case of the

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67. *Id.* at 1382-83.

68. *Id.*

69. *See* FED. R. CRIM. P. 6(e)(2) (prohibition in disclosure limited to "matters occurring before the grand jury").

70. *See Butterworth*, 110 S. Ct. at 1380 (discussing reasons for grand jury secrecy); Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218-24 (1979) (discussing reasons for grand jury secrecy, but acknowledging that disclosure is warranted, permissible under the rule, and should not be denied, in certain circumstances); *Investigation and Police Practice*, in Project, *Eighteenth Annual Review of Criminal Procedure*, 77 GEO. L.J. 489, 727-33 (1989) ("The circuit courts are split over whether rule 6(e)(2) may be used to require witnesses to keep secret their involvement with the grand jury."); FED. R. CRIM. P. 6(e)(2) advisory committee's note ("The rule does *not* impose any obligation of secrecy on witnesses.") (emphasis added); *see also* White-Collar Crime: Fourth Survey of Law, *Parallel Civil and Criminal Suits*, 24 AM. CRIM. L. REV. 855, 861-67 (1987).

Term because it did not generate a majority opinion.[71] It generated a whole host of individual opinions dealing with what is a very serious problem in the administration of first amendment law; local licensing laws that deal with disfavored businesses, and specifically with sexually explicit businesses that attempt to license movie houses, bookstores, and attempt to impose some degree of restriction on how those businesses operate in a way that will be consistent with the first amendment.

Up until last Term, the orthodox assumption was that coming out of cases like *Freedman v. Maryland*,[72] which was in the first wave of movie censorship cases back in the mid-sixties, if you were going to have a licensing scheme, the licensing scheme had to be carefully loaded with a series of procedural protections that would prevent the licensing scheme from turning into a prior restraint.[73] There were two critical procedural restrictions. First, that there had to be expeditious judicial review of any refusal to grant a license.[74] Second, it was the government that had to move to take the case into court.[75] In other words, the government had to have a mechanism that would move the case from the administrative process to the judicial review process in an expeditious way that was essentially cost-free to the claimant. That was the theory of those old cases, that you could have a licensing scheme in the area, but only if there was a virtual automatic judicial review within days of the denial of a license and if the initiative for bringing the case into court was placed on the government and not on the individual.[76]

Dallas passed a comprehensive set of ordinances designed to license sexually explicit businesses.[77] The standards pursuant to which licenses could be granted were quite shadowy; they were very vague. There was no provision for automatic judicial

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71. *See* FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990).

72. 380 U.S. 51 (1965).

73. *See id.* at 57-59.

74. *Id.* at 59.

75. *Id.* at 58-59.

76. *See also, e.g.*, Vance v. Universal Amusement Co., 445 U.S. 308 (1980); Teitel Film Corp. v. Cusack, 390 U.S. 139 (1968).

77. *See* DALLAS, TEX. CITY CODE §§ 41A-1 to 41A-23 (1990).

review and there was not even a guarantee of expeditious judicial review.[78] So under the old set of rules, the Dallas licensing provisions were probably unconstitutional.

When *FW/PBS, Inc. v. City of Dallas* came up to the Supreme Court, the Supreme Court fragmented.[79] There were at least three major opinions and I suspect five or six different approaches among the justices on how the case should come out. The net result of the case, the net result of the several different opinions—there was no opinion for the Court in the case, so it is difficult to predict with any certainty what the case means—was clearly a diminution in the required level of procedural protection. It is clearly down, but we do not know by how much. And there are three different views of how much it is down. The center of the Court in this case, the O'Connor opinion,[80] stated, as long as access to a court is available in a reasonably prompt period of time, the government does not have to bear the burden of taking it there.[81] In other words, as long as judicial review of one of these licensing provisions is available, and available relatively quickly, then the individual should have to pay for getting it into court and take the initiative for getting it into court. That is a fairly significant shift because it means that you can deny a license to someone and the initial burden will then rest with the individual to bring the case into court, rather than according to the old rules which automatically precipitated the case into court very quickly for a judicial review of the denial of the license.

The second group on the Court seemed to think that the rules should be changed; that there was no special need to have particularly expeditious judicial review, as long as judicial review was available on the same terms and conditions as it was

78. *See id.* § 41A-11.

79. In *FW/PBS*, Justice O'Connor filed the majority opinion joined by Justices Stevens and Kennedy, *FW/PBS*, 110 S. Ct. at 601; Justice Brennan filed a concurring opinion joined by Justices Marshall and Blackmun, *id.* at 611; Justice White filed an opinion concurring in part and dissenting in part, joined by Chief Justice Rehnquist, *id.* at 614; Justice Stevens filed a separate opinion concurring in part and dissenting in part, *id.* at 617; and Justice Scalia filed a separate opinion concurring in part and dissenting in part. *Id.*

80. *Id.* at 601.

81. *Id.* at 607.

available for any other set of rules.[82] There was no need for some sort of special mechanism to get into court. Finally, Scalia took the position that he did not think any special protection was necessary at all because he had serious doubts about whether the businesses were engaged in constitutionally protected activity at all.[83] His was only a single vote on the issue of obscenity.

To summarize, the liberal wing of the Court[84] wanted to hold onto the old procedural protections and the center of the Court relaxed the procedural protections certainly in one way and maybe in two. The first is that the government no longer has to bring the case to court. The individual can be required to bring the case to court. Secondly, it is now unclear how much time can elapse between the denial of the license and going directly into court. Undoubtedly, we have not seen the end of those issues. Those issues will be back before the Court as they try to work out what the constitutional limits are on local licensing ordinances dealing with sexually explicit businesses.

The other issue is of enormous concern to local regulatory agencies. It deals with the extent to which you can regulate commercial speech; billboards and other forms of commercial expression in your neighborhoods. Up until 1976, there was no such thing as commercial speech.[85] Before the Court invented it in the mid-seventies,[86] there was an absolute bright line distinction between political and artistic speech that was protected by the first amendment and economic speech that was thought to be a species of economic activity protected under the property clauses of the fifth and fourteenth amendments, but which did not have any special first amendment protection.[87]

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82. *Id.* at 616-17 (White, J., concurring in part, dissenting in part).

83. *Id.* at 623 (Scalia, J., concurring in part, dissenting in part).

84. *See supra* notes 8-9 and accompanying text.

85. *See id.*

86. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc. 425 U.S. 748 (1976); *see also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

87. *See* Neuborne, *First Amendment and Government Regulation of Capital Markets,* 55 BROOKLYN L. REV. 5 (1989).

In the mid-seventies, Justices Blackmun and Powell pioneered the development of a theory of commercial speech that essentially went something like this: Consumers are like voters, when you consume, you are really just voting with your dollars. You are voting in an economic market just like voters in a political market. Consumers are entitled under the constitution to be able to receive information needed to make rational economic choices, just as voters are entitled to receive information needed to make rational political choices.[88] They argued that the commercial speech doctrine, and therefore, the first amendment protected commercial speech as well.[89]

Between 1975 and 1985 there was an absolute wave of Supreme Court decisions striking down regulation of commercial speech,[90] culminating in a series of cases that set out very, very restrictive standards.[91] The Court said that if the speech was not false or misleading, and if there was some overwhelming social need that could not be advanced any other way, the speech was going to be protected. It did not matter whether it was "For Sale" signs on people's lawns,[92] billboards,[93] or a whole host of commercial material, the speech was protected.

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88. *See Virginia State Board of Pharmacy*, 425 U.S. at 763-65.

89. *Id.* at 770.

90. *See* Neuborne, *supra* note 87, at 5 n.2.

91. *Id.* These standards were first announced in Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). In *Central Hudson*, the Court stated:

> In commercial speech cases . . . a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566. *See also* Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60 (1983).

92. *See* Linmark Assoc., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (ordinance prohibiting posting of real estate "For Sale" signs on residential property held violative of first amendment).

93. *See* Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (ordinance prohibiting "outdoor advertising displays" held violative of first amendment).

The Court began to retreat in 1986, in a case called *Posadas,*[94] the case dealing with advertising of gambling on the island of Puerto Rico. In that case, the Court upheld a prohibition on gambling casino advertising, taking the position that Puerto Rico had a substantial governmental interest in diminishing gambling among its population;[95] that it did not have to carry out that interest by absolutely prohibiting it, it was enough if they limited advertising to the natives and allowed the advertising to the people who were coming down on vacation.[96] If the people coming down on vacation wanted to gamble in Puerto Rico, that was fine, but you could limit the advertising directed to the natives. That was upheld in a decision by Justice Rehnquist that many people thought was the beginning of the end of the commercial speech doctrine[97] because of its potential consequences. If the government of Puerto Rico had enough of an interest to prohibit advertising to natives in that case, then governments all over the country could articulate analogous interests in dealing with commercial speech that they did not like and suppress it in very much the same way.

Last Term the Court made it very clear that *Posadas* was not intended to end the commercial speech doctrine and reinforced it very strongly with Justice Kennedy a key player, so that Justice Kennedy is now firmly down on the side of commercial speech.[98] The case was a silly little case but it had exactly the kinds of doctrinal overtones that were very important in the commercial speech doctrine. It dealt with a lawyer in Illinois who printed on his letterhead not only his name and

94. Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328 (1986).

95. *Id.* at 341.

96. *Id.* at 343-44.

97. *See* DeVore, Posadas de Puerto Rico v. Tourism Company of Puerto Rico: *The End of the Beginning*, 10 HASTINGS COMMENT L.J. 579 (1988); Kotler, *Commercial Speech Up in Smoke: The Supreme Court's Approval of Advertising Restrictions for Gambling Could Mean the End of Cigarette Ads*, 6 CALIF. LAW 20 (1986); *The Supreme Court, 1985 Term—Leading Cases*, 100 HARV. L. REV. 100, 172 (1986); 1986 SUP. CT. REV. 1 (1986); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 901-04 (2d ed. 1988).

98. *See* Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281 (1990).

address, but also a statement that he was certified as a civil trial specialist by the National Board of Trial Advocacy[99] (NBTA), a group in Cambridge, Massachusetts, that Judge Fuchsberg has headed on and off for a couple of years. It is an excellent group. The NBTA screens people and makes sure that they have a significant amount of experience in trying cases. They have written criteria that are very, very rigorous and if the criteria is satisfied, then NBTA certifies the lawyer as a civil trial expert.[100] This lawyer had on his letterhead that he had been certified as a civil trial expert.[101] It was true, and it was probably relevant in terms of a consumer making a choice about who they were going to hire. Unfortunately, it ran headlong into the Illinois decision not to have specialization, and not to go to special certification and not to stratify the profession in terms of experts in various areas.[102]

The lawyer was representing someone before the Illinois Disciplinary Commission and sent a letter to them on behalf of his client.[103] The Disciplinary Commission took one look at the letter and had a slight rise in blood pressure and censured the lawyer.[104] The Supreme Court held that since it was true, it was truthful speech, and it was of potential assistance to consumers in making a choice, the speech had first amendment protection and Illinois' attempt to justify suppression by saying that people might be misled by the speech was violative of the first amendment.[105] Illinois argued that people might be misled in two ways. They said, first, they might be misled into thinking this was some sort of official government imprimatur that was being used,[106] and second, they might be misled into thinking that this attorney was a better lawyer than somebody who did not have a certification but who might be equally as good

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99. *Id.* at 2285.

100. *See id.* at 2285 & n.4.

101. *Id.* at 2285.

102. *See id.* at 2286 & n.8.

103. *See* Margolick, *Letterhead Litigation and the Endless Effort to Define Permissible Lawyer Advertising*, N.Y. Times, Dec. 15, 1989, at B20, col. 1.

104. *See In re* Peel, 126 Ill. 2d 397, 534 N.E.2d 980 (1989).

105. Peel v. Attorney Registration and Disciplinary Comm'n, 110 S. Ct. 2281, 2293 (1990).

106. *Id.* at 2287.

or better in court.[107] Therefore, there was a double potential for misleading. The Supreme Court agreed that there was a potential for misleading,[108] but they said that since the speech was protected by the first amendment, Illinois had to adopt a mechanism for dealing with the potential for misleading that was narrower than absolute prohibition of the speech.[109]

Marshall wrote in a separate concurrence, joined by Brennan, in which they made it absolutely clear that if Illinois had required a disclaimer—you can just see what some of these letterheads are going to look like soon, it is going to be like the phone book, there will be an arrow, there will be all sorts of things—it would have been okay.[110] That would have been a narrowly thought through way of dealing with whatever the evil was that Illinois was trying to cope with. But absolutely prohibiting the material on the lawyer's letterhead was far too overbroad an approach and so they struck it down.[111]

Peel is of mild interest to lawyers, but the more important aspect of the case is that it shows that the Court is strongly committed—the current Court continues to be strongly committed—to a commercial speech doctrine that places significant constitutional limitations on the government's ability to regulate truthful commercial speech that is of help to consumers, even in settings where there is a potential for misleading. What government must do is tailor its regulatory apparatus to the narrowest way of dealing with the potential for misleading rather than regulating in a prophylactic way and prohibiting all of the speech.

There is no case on the docket this Term that raises a similar commercial speech problem and it looks as though the Court may be taking a rest from the commercial speech cases. They have chosen not to take any this year,[112] so it may well

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107. *Id.*

108. *Id.* at 2288-91.

109. *Id.* at 2291-93.

110. *Id.* at 2296 (Marshall, J., concurring).

111. *Id.* at 2293.

112. *See, e.g.*, United States Healthcare, Inc. v. Blue Cross, 898 F.2d 914 (3d Cir.), *cert. denied*, 111 S. Ct. 58 (1990); Eimann v. Soldier of Fortune Magazine, Inc., 880 F.2d 830 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 729 (1990).

be that the Court has made a judgment that it has said enough about commercial speech and it is going to be taking a rest for a while on the commercial speech cases.

The other very important doctrinal case is a case called *Austin v. Michigan Chamber of Commerce*,[113] in which the liberals and conservatives crossed over, they changed sides.[114] It is a very interesting new line up. Michigan has a statute that prohibits corporations from spending money even as an independent expenditure in a campaign.[115] In other words, it is quite routine to prohibit corporations from giving money directly to political candidates, but in recent years, nobody has tried to prohibit a corporation from spending its own money itself to advance a political candidate. The old justification for restricting corporate campaign contributions had been that if a corporation makes a contribution directly to a candidate, the possibility for some sort of quid pro quo, or at least the appearance of the possibility of a quid pro quo, is too great. Therefore, in order to maintain the integrity of the electoral process, absolute prohibitions on corporate campaign contributions can be imposed.

Michigan went one step further. What Michigan said was, not only do we not want the corporations making direct contributions to the candidates, we do not want the corporation spending money on their own speech in favor of or in opposition to the candidate.[116] We do not want them taking positions at all.[117]

Under existing first amendment doctrine, the Sixth Circuit had no difficulty striking that down.[118] That appeared to be an

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113. 110 S. Ct. 1391 (1990).

114. In *Austin*, Justice Marshall delivered the opinion for the Court in which Justices Rehnquist, Brennan, White, Blackmun, and Stevens joined; Justice Scalia filed a dissenting opinion; and Justice Kennedy filed a dissenting opinion joined by Justices O'Connor and Scalia.

115. *See* MICH. COMP. LAWS § 169.254(1) (1979).

116. *See Austin*, 110 S. Ct. at 1395.

117. *Id.*

118. *See* Michigan State Chamber of Commerce v. Austin, 856 F.2d 783, 790 (6th Cir. 1988) (Chamber's political advertisement is speech lying at heart of first amendment and statute as applied was unconstitutional because not supported by compelling state interest), *rev'd*, 110 S. Ct. 1391 (1990).

unconstitutional restriction on the ability of a corporation. Once you said corporations could speak back in the mid-seventies, once the Supreme Court said that a corporate speech was protected by the first amendment,[119] a corporation making an independent campaign expenditure appeared to be at the core of what corporate speech protection is all about. In *Austin*, the Supreme Court surprised everybody by upholding the statute, by upholding the prohibition on independent campaign expenditures,[120] in an opinion in which the liberals participated in the majority—Brennan and Marshall in the majority. Their theory was this: Corporations obtained their money essentially through economic transactions and they should not then be able to use that money, or at least the state of Michigan can make a decision that they should not be able to use money, that was generated through garden variety economic transactions and turn around and use that money to advance political ends.[121]

There is something suspect about corporations using money that is generated for one reason and turning it around and advancing it for political ends in another. There is also the risk that corporations will dominate political discourse because they have access to more wealth than most individuals ordinarily have especially since that wealth has been generated through economic transactions.[122] So, corporations are a sufficiently strong threat to the operation of a fair political process, that they can be kept out of the game. However, that does not outlaw Political Action Committees (P.A.C.s).[123] They said, of

119. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

120. *Austin*, 110 S. Ct. at 1395.

121. *Id.* at 1397-1400.

122. *Id.* at 1397-98.

123. Congress has defined a political committee as:

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of [2 U.S.C.] section 441b(b) . . .; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure . . . aggregating in excess of $5,000 during a calendar year, or makes contributions aggregat-

course, the corporation can maintain an entity and allow its employers and shareholders to contribute their own money which will then be used in political campaigns.[124] But the corporation's own treasury cannot be tapped either to make direct contributions or to make independent expenditures.[125]

The conservatives dissented in a very angry way. Justice Scalia wrote a superb dissent on first amendment grounds saying that this is ridiculous, you cannot tell a corporation that it cannot spend its own money to advance political ends if that is what it wants to do and still seriously say it has first amendment rights.[126] The core of the free speech clause is the protection of the ability of an entity to advance political ends with the entity's own money.[127] Scalia predicted that this was the beginning of the populist attempt to check rich people's influence on politics by cutting back on the ability of large economic players to exert an inappropriate degree of political control on the electorate.[128] His opinion says, whether that is a good idea or bad idea, it runs directly into the first amendment. It is exactly what the Court would not do back in 1976, in *Buckley v. Valeo*,[129] but it is what they may be taking a second look at now in the context of corporations.

The important open questions after the *Chamber of Commerce* case are (1) are they going to apply it to partnerships as well, and (2) are they going to apply it to wealthy individuals. In other words, if you have a wealthy sole proprietor who generates an enormous amount of money through her business and the sole proprietor then wants to make contributions from the

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ing in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year.

2 U.S.C. 431(4) (1988). *See also* Epstein, *The PAC Phenomenon: An Overview*, 22 ARIZ. L. REV. 355 (1980); Leatherberry, *Rethinking Regulation of Independent Expenditures by PACs*, 35 CASE W. RES. L. REV. 13 (1985); *cf.* Wright, *Money and Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982).

124. Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391, 1398 (1990).

125. *Id.* at 1397-98.

126. *Id.* at 1408 (Scalia, J., dissenting).

127. *Id.* at 1408-09.

128. *Id.* at 1408.

129. 424 U.S. 1 (1976).

business treasury in connection with a political campaign, can that be forbidden? If you can prevent a corporation from doing it, can you prevent a partnership from doing it? Can you prevent a sole proprietorship from doing it?

Most corporations take political positions that I do not like. I make no secret of the fact that over the years I have espoused political positions that tend to be exactly opposite from what the local chamber of commerce would want. But, it seems to me absolutely inconsistent with free speech doctrine to tell a corporation that they cannot spend their own money on the advancement of these issues. Unless we want to rethink first amendment doctrines and say that corporations are not protected at all, if they continue to have free speech protection, then I think that the decision last Term in *Michigan Chamber of Commerce* is completely inconsistent with the decision in the seventies holding that the First National Bank of Boston had a constitutional right to spend its own money opposing a state income tax.[130] The technical distinction is that First National Bank of Boston was spending its money on a public issue,[131] whereas the Michigan case dealt with an actual election involving candidates. And I suppose for first year law school purposes, that is a distinction. But frankly for first amendment purposes, it is a distinction without a difference. If you have a constitutional right to speak on a referendum, why should you not have a constitutional right to speak on an election?

I can understand the prohibition on giving money directly to the candidate. That is the quid pro quo problem and getting too closely connected with the candidate. But once you are willing to say, okay, I will stay away from the candidate, I just want to support that person with the corporation's own money, I think that *Michigan Chamber of Commerce* will have a short life span especially now that Brennan is gone. The conservative first amendment theoreticians on the Court will not allow the liberals to forget that this is out of whack with their usual approach and they will start nibbling away at it.

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130. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978).

131. *See id.* at 769.

One last free speech case because so many of you are involved in worrying about regulating what takes place on sidewalks and streets. There was an important case in the Court last Term that dealt with local ordinances regulating control over sidewalks and streets, *United States v. Kokinda*.[132] *Kokinda* was a case in which a controversial group wanted to set up a table on a sidewalk that ran from the post office parking lot to the back of the post office, to solicit political contributions.[133] The parking lot was really part of the post office's property.[134] It was not an ordinary sidewalk that people walked on. It was off to the side and in the area that led from the parking lot to the post office, in an area that had been traditionally treated as the post office's property, and indeed, technically, it was the post office's property.[135]

The argument was that this is a sidewalk, it is open to the public, and under traditional public forum theory, once you have a sidewalk open to the public, you cannot pick and choose over who is going to be able to exercise first amendment activity on it. Everybody gets the ability to do it subject only to legitimate time, place, and manner restrictions, first-come first-serve requirements, and space requirements.[136] You cannot tell somebody that they cannot have a table somewhere, without some sort of very serious justification. Again the traditional law, I think, would have said that there was a right to have a table there. The Court rejected it.[137]

In *Kokinda*, the Court took public forum doctrine into potentially new areas. What they said was that the post office had not intentionally opened up that sidewalk as a public forum; they had not intentionally allowed people to engage in free speech activities there and, therefore, it was to be treated as private property.[138] It was the post office's sidewalk. While they let people walk on it, while it was sort of generally open to

132. 110 S. Ct. 3115 (1990).
133. *Id.* at 3117-18.
134. *Id.* at 3120.
135. *Id.*
136. *See id.*; *see also id.* at 3125-26 (Kennedy, J., concurring).
137. *Id.* at 3123.
138. *Id.* at 3121.

the public, it had not been dedicated by a conscious decision by the post office to open it up to full first amendment activity and, therefore, it was not a public forum.[139]

That is the first case in many years beginning to cut back on geographical free speech protections. It, at least, raises the possibility that there will be areas that look as though they ought to be public areas for free speech situations, but which somehow are not. I am of two minds about it. I worry about it from a free speech perspective, but it also seems to me to have some interesting implications as well. There can be areas carved out as quiet areas in a town, in a park, for example, that are off limits to free speech activity. That the purpose of the area is just to go sit and contemplate and you do not have to worry about having somebody run up to you and importune you for a contribution or hand you a leaflet. It holds out the possibility that areas open to the public do not necessarily then become open to the full spectrum of first amendment doctrine. However, I fear, though, that foolish governmental officials will abuse it, and will not adequately care about first amendment values and will simply use this as an excuse to take unpopular first amendment speech and make it unavailable in their town. But, if it is applied in an appropriate way, it is also an opportunity to allow both vigorous exercise of free speech and an opportunity for somebody who wants a little quiet and rest to find a place where that can take place as well.

The last thing I will say is just a word on the religion cases. The most important doctrinal case, a case out of Oregon, decided last Term in the first amendment area and, in my own opinion in the entire Term, was an unfortunate decision by the Supreme Court, *Employment Division v. Smith*.[140] Again, it dealt with a strange fact pattern, but has very important doctrinal overtones. *Employment Division v. Smith* dealt with a number of Indian Tribes in the northwest and the southwest that use peyote in their religious ceremonies.[141] It is a sacramental drug and used as part of the religious rites. If that falls

139. *Id.* at 3120.
140. 110 S. Ct. 1595 (1990).
141. *Id.* at 1597-98.

on strange ears for a moment, just think about the use of sacramental wine in more mainstream religious activities. The Indians used peyote as part of their sacramental rights and the question was could you deny unemployment compensation to an individual who was fired because he had been criminally prosecuted for using the peyote as part of his religious ritual?[142] Many states, but not Oregon, have an exemption to their drug laws allowing the sacramental use of peyote at Indian religious ceremonies.[143] Arizona has such a provision.[144] It is not an abnormal provision. But Oregon simply, I think, forgot to put it in. I do not think this was a conscious attempt at crushing anybody, it is just that nobody thought about it. And so there are no exemptions from the Oregon criminal laws for the sacramental use of small amounts of peyote. This individual is prosecuted for it, gets fired because of it, and says I am applying for unemployment compensation, and you cannot deny me unemployment compensation for exercising my religion.[145]

The most important case in this line, in this free exercise line of cases, was a 1963 case saying that you could not deny a Seventh-day Adventist unemployment compensation because she refused to work on a Saturday in a mill town in which you needed to work a six-day week in order to get a job.[146] The argument was, "you provoked your own discharge by refusing to come to work on Saturday."[147] The woman replied that her refusal to work was because of her religious conscience and, therefore, unemployment compensation could not be denied because she lived consistently with her religious conscience.[148]

That case—*Sherbert v. Verner*—had been the bedrock of free exercise doctrine in the United States.[149] It is one of the

142. *Id.* at 1597.

143. *See id.* at 1606.

144. *See* ARIZ. REV. STAT. ANN. § 13-3402(B)(1)-(3) (1989).

145. Employment Division v. Smith, 110 S. Ct. 1595, 1597-98 (1990).

146. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

147. *Id.* at 400-01.

148. *See id.*; *see also id.* at 403-04.

149. *See generally* Tillotson, *Free Exercise in the 1980s: A Rollback of Protection*, 24 U.S.F. L. REV. 505 (1990); Lupo, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989); Note,

proudest cases that we have. It is a hymn to religious conscience.

Unfortunately, *Employment Division v. Smith* puts *Sherbert* into a good deal of doubt because what they say is if Oregon did not intend to hurt this person's religious conscience, if this was not an intentional attempt at hurting this person's religious conscience, the fact that it happens to have done so does not trigger strict scrutiny.[150] As long as Oregon had a rational basis for wanting to get rid of drugs, and for getting rid of peyote, unrelated to its religious effects, that is a rational basis for forbidding its use.[151] And the fact that it happens to crush an Indian's religious beliefs, is just too bad. If it had intentionally crushed his beliefs, then it would have been invalid. It is a back door introduction into free exercise law of the distinctions that exist in the equal protection law today between intentional and unintentional discrimination. Intentional violation of somebody's religious values continues to be very, very strongly protected. However, unintentional violations, after all, are the real problem. We do not live, thank God, in a society where there is widespread intentional interference with other people's religious beliefs. We do, however, live in a society that is tremendously heterodox, with tremendously different beliefs, where we do things all the time without realizing what they do to other people's religious beliefs. If those kinds of unconscious, unknowing, unintentional violations of someone's religious beliefs are going to be all right, then the net effect is going to be that the weakest and the smallest sects are going to continually find their religious beliefs violated and their practices of religions frustrated and they are going to be without any judicial remedy. The only remedy they have is to come into the legislature and say, hey, you could not have meant that, will you please fix that.

Burdens on the Free Exercise of Religion: A Subjective Alternative, 102 HARV. L. REV. 1258 (1989); Note, *The "Core"-"Periphery" Dichotomy in First Amendment Free Exercise Clause Doctrine:* Goldman v. Weinberger, Bowen v. Roy, and O'Lone v. Estate of Shabazz, 72 CORNELL L. REV. 827 (1987).

150. *Smith*, 110 S. Ct. at 1602-06.

151. *See id.* at 1600-02.

Well, any one of you who is a sophisticated political operative knows how hard it is to get legislation through even if nobody intentionally wanted to do it. It simply means that the initial burden of getting the change now falls on the small apparently "kooky" religions that people do not really take seriously because they are not mainstream religions. It is very sad because it runs counter to what I said when I began my remarks. The decision in *Employment Division v. Smith* was written by Scalia, by a judge who you would have hoped, or I would have hoped, had more of an understanding of what it means to be a deeply religious individual and to have your life run by something other than the laws of man. He exhibited a tremendous insensitivity to the religious needs of the weakest among us. I hope it is a momentary aberration. But if it is the opening salvo in a series of decisions in which Scalia stops being a libertarian and starts moving to be a majoritarian, then the coalescence of the Court's structure is going to be very different. Then you are going to have Rehnquist and Scalia pulling in tandem. And there is then going to be, I think, a very, very powerful shift against protection of individual rights and towards majoritarian control. I do not think that is going to happen. But on the other hand, not once in the years I was at the ACLU did I think we were going to lose a case, and that occasionally happened.

Thank you very much.

Judge Leon Lazer:

Are there any questions?

Professor Gary Shaw:

Not a question. Just an additional piece of information. The additional information is that Representative Steven Solarz[152] introduced a Bill in Congress to legislatively overrule *Smith* and reinstate the compelling state interest for situations like this.[153] So there is some hope.

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152. Stephen J. Solarz, D-NY, represents the 13th District of New York.

153. *See* H.R. 5377, 101st Cong., 2d Sess. (1990).

Audience Participant:

Sherbert[154] had been reaffirmed several times in the recent past. I remember one of the votes was eight to one.

Professor Burt Neuborne:

Yes, the *Thomas* case.[155]

Audience Participant:

My question to you is, is there any way to read *Smith*[156] and *Sherbert* consistently with each other? Is there some way to maintain the *Sherbert* decision under the *Smith* case?

Professor Burt Neuborne:

The distinction that I have been using, and you can judge yourself whether you think it would fly, is that *Sherbert* was a refusal to allow a Seventh-day Adventist to get unemployment compensation.[157] *Thomas*, which was the next one in that line, was a passivist who felt that he could no longer work on tanks, quit from a munitions factory, and then applied for unemployment compensation.[158] It was a factory that made trucks and shifted over to make tanks. He tried to work there for a month or two, found that it was inconsistent with his conscience and then quit.[159] They denied unemployment compensation to him.[160]

The difference between the three cases is that in *Smith*, the individual engaged in conduct which was affirmatively prohibited by the criminal law of the state.[161] In the other two settings, the individuals engaged in conduct which was enough economically to force him to lose his job, but which did not violate any other norm of the state. So what I am trying to do is limit *Smith* to those very few categories of conduct where

154. Sherbert v. Verner, 374 U.S. 398 (1963).
155. Thomas v. Review Bd., 450 U.S. 707 (1981).
156. Employment Div. v. Smith, 110 S. Ct. 1595 (1990).
157. *Sherbert*, 374 U.S. at 399-400.
158. *Thomas*, 450 U.S. at 709.
159. *Id.* at 710.
160. *Id.* at 712.
161. Employment Division v. Smith, 110 S. Ct. 1595, 1598-99 (1990).

the state has felt that conduct is so dreadful that it should be prohibited by the criminal law saying, well, under those circumstances, maybe we will use a rational basis test.[162] But in any other setting, we are trying to keep alive the compelling state interest test,[163] which only goes to prove give a lawyer enough rope and you make an argument out of anything. But I think there is something to that distinction and so far a number of lower court judges have expressed some sympathy with it.

162. *See id.* at 1599-1600.
163. *See Sherbert*, 374 U.S. at 403.